ENVIRONMENTAL PROTECTION AGENCY

[FRL–5251–7]

Announcement and Publication of Final Policy Toward Owners of Property Containing Contaminated Aquifers

SUMMARY: This policy states the agency's position that, subject to certain conditions, where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement actions under CERCLA, 42 U.S.C. 106 and 107, against the owner of such property to require the performance of response actions or the payment of response costs.

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Dated: June 21, 1995.

Bruce M. Diamond,

Director, Office of Site Remediation Enforcement.

POLICY TOWARD OWNERS OF PROPERTY CONTAINING CONTAMINATED AQUIFERS

I. Statement of Policy

Based on the Agency's interpretation of CERCLA, existing EPA guidance, and EPA's Superfund program expertise, it is the Agency's position that where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs.[1] Further, EPA may consider *de minimis* settlements under Section 122(g)(1)(B) of CERCLA where necessary to protect such landowners from contribution suits.

This Policy is subject to the following conditions:

(A) The landowner did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substances, through an act or omission. The failure to take affirmative steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, constitute an ''omission'' by the landowner within the meaning of this condition. This policy may not apply where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer. These cases will require fact-specific analysis.

(B) The person that caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner. In cases where the landowner acquired the property, directly or indirectly, from a person that caused the original release, application of this Policy will require an analysis of whether, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances that gave rise to the contamination in the aquifer.

(C) There is no alternative basis for the landowner's liability for the contaminated aquifer, such as liability as a generator or transporter under Section 107(a) (3) or (4) of CERCLA, or liability as an owner by reason of the existence of a source of contamination on the landowner's property other than the contamination that migrated in an aquifer from a source outside the property.

In appropriate circumstances, EPA may exercise its discretion under Section 122(g)(1)(B) to consider *de minimis* settlements with a landowner that satisfies the foregoing conditions. Such settlements may be particularly appropriate where such a landowner has been sued or threatened with contribution suits. EPA's Guidance on Landowner Liability and Section 122(g)(1)(B) *De Minimis* Settlements [2] should be consulted in connection with this circumstance.

In exchange for a covenant not to sue from the Agency and statutory contribution protection under Sections 113(f)(2) and 122(g)(5) of CERCLA, EPA may seek consideration from the landowner,[3] such as the landowner's full cooperation (including but not limited to providing access) in evaluating the need for and implementing institutional controls or any other response actions at the site.[4]

The Agency intends to use its Section 104(e) information gathering authority under CERCLA, 42 U.S.C. 9604(e), as appropriate, to verify the presence of the conditions under which the Policy would be applied, unless the source of contamination and lack of culpability of the property owner are otherwise clear.[5] Accordingly, failure by an property owner to provide certified responses to EPA's information requests may, by itself, be grounds for EPA to decline to offer a Section 122(g)(1)(B) *de minimis* settlement.

II. Discussion

A. Background

Nationwide there are numerous sites that are the subject of response actions under CERCLA due to contaminated groundwater. Approximately 85% of the sites on the National Priorities List have some degree of groundwater contamination. Natural subsurface processes, such as infiltration and groundwater flow, often carry contaminants relatively large distances from their sources. Thus, the plume of contaminated groundwater may be relatively long and/or extend over a large area. For this reason, it is sometimes difficult to determine the source or sources of such contamination.

Any person owning property to which contamination has migrated in an aquifer faces potential uncertainty with respect to liability as an ''owner'' under Section 107(a)(1) of CERCLA, 42 U.S.C. 9601(a)(1), even where such owner has had no participation in the handling of hazardous substances, and has taken no action to exacerbate the release.

Some owners of property containing contaminated aquifers have experienced difficulty selling these properties or obtaining financing for development because prospective purchasers and lenders sometimes view the potential for CERCLA liability as a significant risk. The Agency is concerned that such unintended effects are having an adverse impact on property owners and

[1] By this Policy, EPA does not intend to compromise or affect any right it possesses to seek access pursuant to Section 104(e) of CERCLA.

[2] See Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, OSWER Directive No. 9835.9, June 6, 1989, 54 FR 34235 (August 18, 1989) (hereinafter ''Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements'').

[3] A more complete discussion of the appropriate consideration that may be sought under Section 122(g)(1)(B) settlements is contained in Section IV.B.3.a. of Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2.

[4] The Agency has developed guidance which explains the authorities and procedures by which EPA obtains access or information. See Entry and Continued Access under CERCLA, OSWER Directive #9829.2, June 5, 1987; Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, OSWER Directive 9834.4–A, August 25, 1988.

[5] See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2, for an outline of the types of information which should be provided by the landowner to support a request for a *de minimis* settlement.

on the ability of communities to develop or redevelop property.

EPA is issuing this policy to address the concerns raised by owners of property to which contamination has migrated in an aquifer, as well as lenders and prospective purchasers of such property. The intent of this policy is to lower the barriers to transfer of such property by reducing uncertainty regarding the possibility that EPA or third parties may take actions against these landowners.

B. Existing Agency Policy

This policy is related to other guidance that EPA has issued. The Agency has previously published guidance on issues of landowner liability and *de minimis* landowner settlements.[6] Moreover, in other EPA policies, EPA has asserted its enforcement discretion in determining which parties not to pursue.[7]

C. Basis for the Policy

1. The Section 107(b)(3) Defense

Section 107(a)(1) of CERCLA imposes liability on an owner or operator of a ''facility'' from which there is a release or threatened release of a hazardous substance.[8] A ''facility'' is defined under Section 101(9) as including any ''area where a hazardous substance has * * * come to be located.'' The standard of liability imposed under Section 107 is strict, and the government need not prove that an owner contributed to the release in any manner to establish a *prima facie* case.[9] However, Section 107(b)(3) provides an affirmative defense to liability where the release or threat of release was caused solely by ''an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant * * *'' In order to invoke this defense, the defendant must additionally establish, by a preponderance of the evidence, that ''(a) he exercised due care with respect to the hazardous substance concerned taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.'' 42 U.S.C. § 9607(b)(3).

a. *Due Care and Precautions.* An owner of property may typically be unable to detect by reasonable means when or whether hazardous substances have come to be located beneath the property due to subsurface migration in an aquifer from a source or sources outside the property. Based on EPA's interpretation of CERCLA, it is the Agency's position that where the release or threat of release was caused solely by an unrelated third party at a location off the landowner's property, the landowner is not required to take any affirmative steps to investigate or prevent the activities that gave rise to the original release in order to satisfy the ''due care'' or ''precautions'' elements of the Section 107(b)(3) defense.

Not only is groundwater contamination difficult to detect, but once identified, it is often difficult to mitigate or address without extensive studies and pump and treat remediation. Based on EPA's technical experience and the Agency's interpretation of CERCLA, EPA has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems, is not, in the absence of exceptional circumstances, a failure to exercise ''due care'' or ''take precautions'' within the meaning of Section 107(b)(3).

The latter conclusion does not necessarily apply in the case where the property contains a groundwater well and the existence or operation of this well may affect the migration of contamination in the affected aquifer. In such a case, application of the ''due care'' and ''precautions'' tests of Section 107(b)(3) and evaluation of the appropriateness of a *de minimis* settlement under Section 122(g)(1)(B) require a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer. Accordingly, this Policy does not apply in the case where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer. In such a case, however, the landowner may choose to assert a Section 107(b)(3) defense, depending on the case specific facts and circumstances, and EPA may still exercise its discretion to enter into a Section 122(g)(1)(B) *de minimis* settlement.

b. *Contractual Relationship.* The Section 107(b)(3) defense is not available if the act or omission causing the release occurred in connection with a direct or indirect contractual relationship between the defendant and the third party that caused the release. Under Section 101(35)(A) of CERCLA, a ''contractual relationship'' for this purpose includes any land contract, deed, or instrument transferring title to or possession of real property, except in limited specified circumstances. Thus, application of the defense in the circumstances addressed by this Policy requires an examination of whether the landowner acquired the property, directly or indirectly, from a person that caused the original release. An example of this scenario would be where the property at issue was originally part of a larger parcel owned by the person that caused the release. If the larger parcel was subsequently subdivided, and the subdivided property was eventually sold to the current landowner, there may be a direct or indirect ''contractual relationship'' between the person that caused the release and the current landowner.

Even if the landowner acquired the property, directly or indirectly, from a person that caused the original release, this may or may not constitute a ''contractual relationship'' within the meaning of Section 101(35)(A), precluding the availability of the Section 107(b)(3) defense. Land contracts or instruments transferring title are not considered ''contractual relationships'' if the land was acquired after the disposal or placement of the hazardous substances on, in or at the facility under Section 101(35)(A) and the landowner establishes, pursuant to Section 101(35)(A)(i), that, at the time of the acquisition, the landowner ''did not know and had no reason to know that any hazardous substance which is the subject of the release * * * was

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[6] See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2. This guidance analyzes the language in Sections 107(b)(3) and 122(g)(1)(B) of CERCLA.

[7] See, e.g., Policy Towards Owners of Residential Property at Superfund Sites, OSWER Directive #9834.6, (July 3, 1991) (hereinafter ''Residential Property Owners Policy'') (stating Agency policy not to take enforcement actions against an owner of residential property unless homeowner's activities led to a release); National Priorities List for Uncontrolled Hazardous Waste Sites, 60 FR 20330, 20333 (April 25, 1995). In this notice the Residential Property Owners Policy was applied to ''* * * residential property owners whose property is located above a groundwater plume that is proposed to or on the NPL, where the residential property owner did not contribute to the contamination of the site.'' See also, Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Waste, OSWER Directive No. 9834.13, (December 6, 1989).

[8] EPA has taken the position that lessees may be ''owners'' for purposes of liability. See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2, footnote 10.

[9] See, *e.g., U.S.* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989)(''CERCLA contemplates strict liability for landowners'').

disposed of on, in, or at the facility.'' [10] Thus, in the subdivision scenario described above, the current landowner might still qualify for the Section 107(b)(3) defense if he or she did not know or have reason to know that the original landowner had disposed of hazardous substances elsewhere on the larger parcel.

2. Settlements Under Section 122(g)(1)(B)

To address concerns that strict liability under Section 107(a)(1) could cause inequitable results with respect to landowners who had not been involved in hazardous substance disposal activities, Congress authorized the Agency to enter into *de minimis* settlements with certain property owners under Section 122(g)(1)(B) of CERCLA, 42 U.S.C. 9622 (g)(1)(B). Under this Section, when the Agency determines that a settlement is ''practicable and in the public interest,'' it ''shall as promptly as possible reach a final settlement'' if the settlement ''involves only a minor portion of the response costs at the facility concerned'' and the Agency determines that the potentially responsible party: ''(i) is an owner of the real property on or in which the facility is located; (ii) did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility; and (iii) did not contribute to the release or threat of release * * * through any act or omission.'' [11]

The requirements which must be satisfied in order for the Agency to consider a settlement with landowners under the *de minimis* settlement provisions of Section 122(g)(1)(B) are substantially the same as the elements which must be proved at trial in order for a landowner to establish a third party defense under Section 107(b)(3), as described above.[12]

D. Use of the Policy

This Policy does not constitute rulemaking by the Agency and is not intended and cannot be relied on to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. Furthermore, the Agency may take action at variance with this Policy.

For further information concerning this Policy, please contact Ellen Kandell in the Office of Site Remediation Enforcement at (703) 603–8996.

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[10] Section 101(35)(A) also excludes from the definition of ''contractual relationship'' certain acquisitions of property by government entities and certain acquisitions by inheritance or bequest, so long as the other requirements of Section 101(35)(A) are met. See 42 U.S.C. 101(35)(A) (ii) and (iii).

[11] A detailed discussion of each of these components of Section 122(g)(1)(B) and guidance on structuring settlements under this Section are provided in the Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2.

[12] *Id.*

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5252–1]

Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement

SUMMARY: The new prospective purchaser guidance supersedes previous Agency policy on when the Agency will provide a covenant not to sue a prospective purchaser of contaminated property under CERCLA. Previous guidance, issued in June 1989, entitled ''Guidance on Landowner Liability under Section 107(a) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property'' (OSWER Directive No. 9835.9 and 54 FR 34235 (Aug. 18, 1989), had two separate parts, including a model administrative order and a model consent decree for *de minimis* landowner settlements. The first part of the previous guidance, landowner liability/the innocent landowner defense and the Agency's use of *de minimis* landowner settlements including model agreements to use in such settlements remains Agency Policy. The section of the guidance dealing with prospective purchasers is changed by new guidance approved May 24, 1995.

In an effort to promote cleanup for the beneficial reuse and development of contaminated properties, EPA is expanding the criteria by which it will consider entering into prospective purchaser agreements. EPA will consider such agreements if the agreement results in either (1) a substantial direct benefit to the Agency in terms of cleanup or funds for cleanup or (2) a substantial indirect benefit to the community coupled with a lesser direct benefit to the Agency. Additionally, the new guidance should enable the Agency to enter into more prospective purchaser agreements by expanding the universe of eligible sites. A model prospective purchaser agreement has also been developed and is part of the new guidance.

FOR FURTHER INFORMATION CONTACT: Additional information on the prospective purchaser policy is available from Lori Boughton ((703) 603–8959) or Elisabeth Freed ((703) 603–8936) in the Office of Site Remediation Enforcement, 402 M St., S.W., 2273–G, Washington, D.C. 20460. Information regarding the model prospective purchaser agreement and site specific prospective purchaser inquiries should be directed to Helen Keplinger ((202) 260–7116) in the Office of Site Remediation Enforcement, 401 M St. S.W., 2272, Washington, D.C. 20460.

Dated: June 21, 1995.

Bruce M. Diamond,

Director, Office of Site Remediation Enforcement.

Memorandum

Subject: Guidance on Agreements with Prospective Purchasers of Contaminated Property

From: Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance

To: Regional Administrators, Regions I–X; Regional Counsel, Region I–X; Waste Management Division Directors, Regions I–X

This memorandum transmits the guidance and model agreement concerning prospective purchasers of contaminated Superfund property. The attached guidance supersedes the Agency policy issued in June 1989, entitled ''Guidance on Landowner Liability under Section 107(a) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property'' (OSWER Directive No. 9835.9 and 54 FR 34235 (Aug. 18, 1989). The 1989 guidance limited the use of these covenants to situations where the Agency planned to take an enforcement action, and where the Agency received a substantial benefit for cleanup of the site by the purchaser, not otherwise available. In an effort to promote cleanup for the beneficial reuse and development of these properties, EPA is expanding the circumstances under which it will consider entering into prospective purchaser agreements.

Additional information on this policy is available from Lori Boughton ((703) 603–8959) or Elisabeth Freed ((703) 603–8936) in the Office of Site Remediation Enforcement. Information regarding the model agreement and site specific inquiries should be directed to Helen Keplinger ((202) 260–7116) in the Office of Site Remediation Enforcement.

GUIDANCE ON SETTLEMENTS WITH PROSPECTIVE PURCHASERS OF CONTAMINATED PROPERTY

I. Purpose

This document supersedes EPA's policy on agreements with prospective purchasers of contaminated property as set forth in the June 6, 1989, policy document entitled ''Guidance on